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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-689

GARY E. WIDMAR, *et al.*,
Petitioners,

v.

CLARK VINCENT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in support of respondents in this case. Petitioners, through their counsel, have indicated their refusal to consent to appearance of *amici* in this matter, thereby necessitating this motion. The consent of the attorneys for the respondents has been obtained.

The United States Catholic Conference is the civil agency of the Catholic Bishops of the United States. The programs of the USCC embrace the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, and communications and public affairs, with emphasis on the preservation of religious liberty in America.

This case raises the important question of whether a public university may exclude self-directed, extracurricular religious observance by student groups from the campus, either as a purported requirement of the

Establishment Clause or in pursuit of an alleged compelling state interest in strict separation of church and state.

This *amicus* believes that proper evaluation of the issues presented in this case requires consideration of the part which religious values play in shaping the character and social behavior of our people, and of the traditional and functional role which religion has played in public higher education. It is believed that the parties will not deal adequately with these aspects of the issues.

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SUMMARY OF ARGUMENT

The principle of benevolent neutrality serves more than the cause of individual religious liberty. On another level in which the law has a profound practical interest, benevolent neutrality promotes the welfare and common good of society by permitting spiritual values to act freeley, with other influences, as a leaven in the behavior of the citizenry. The public order and common good are served by "benevolent neutrality" every bit as much as is the individual in the enjoyment of his religious freedom.

Religion has long played a prominent part in the life of public universities. Neither the letter nor spirit of the First Amendment requires exclusion of self-directed religious activity by student groups from the campus. The systematic banishment of religious observance from the university campus, which is an otherwise self-contained community, must inevitably contribute to the decline of moral values in modern life and is totally out of keeping with the traditions and modes of the larger society. Moreover, it inhibits the free-exercise rights of the students. Such a policy amounts to one of hostility to religion.

It is doubted that anything contained in the constitution or laws of Missouri, as enunciated by its courts, requires the degree of separation advocated by petitioners. However, even assuming that Missouri's constitution can be so construed, such a state interest can hardly overbalance respondents' legitimate claims to the free exercise of their religion.

ARGUMENT

THE SUPPRESSION OF VOLUNTARY STUDENT RELIGIOUS ACTIVITY IN THIS CASE DISSERVES THE COMMON GOOD OF SOCIETY, RADICALLY DEPARTS FROM THE BEST UNIVERSITY TRADITIONS, AND FLAGRANTLY VIOLATES THE CONSTITUTION'S GUARANTEE OF RELIGIOUS FREEDOM.

In this case a state university has endorsed a lamentable policy of hostility to religion. Its decision is an untenable departure from the principle of "benevolent neutrality" which is the cornerstone of the edifice of church-state relations. *See Walz v. Tax Commission of New York*, 397 U. S. 664, 669 (1970); *Zorach v. Clauson*, 343 U. S. 306, 313-14 (1952).

"Benevolent Neutrality"—A Practical Social Doctrine

The doctrine of "benevolent neutrality" advances the common good of society by permitting spiritual values to act freely, with other influences, as a leaven in the behavior of the citizenry. Benevolent neutrality is an imperative principle founded in the practical wisdom that "piety, religion, and morality are intimately connected with the well being of the State, and indispensable to the administration of civil justice." 3 J. Story, *Commentaries on the Constitution of the United States* 722 (Boston 1833). Benevolent neutrality accords with the policy by which government fosters charitable and educational institutions generally "as conservators of the public morals, and valuable if not indispensable assistants to the preservation of the public order." T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the American Union* 471 (Boston 1868); *see also Bradfield v. Roberts*, 175 U.S. 291 (1899).

Clearly, benevolent neutrality works a just accommodation of religion as a matter of keen social self-interest. In service to this verity, this Court has prudently held:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Zorach v. Clauson, supra, at 313-14. If benevolent neutrality serves society, the hostility to religion which so often pervades the rhetoric of "separation" can only tend to undermine it!

Education And Contemporary Lawlessness—
The Chief Justice Speaks

The ramifications of the banishment of religious activity from the campus are pervasive. Jurists and educators alike have deplored the decline in moral and spiritual values in modern life and have attributed this in large part to the exclusion of moral and spiritual values from our public educational institutions. In his recent report concerning the problem of crime and lawlessness in our society, the Chief Justice observed: "Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for other's rights." *Annual Report to the American Bar Association by the Chief Justice of the United States,* 67 A.B.A.J. 291 (1981). *See also Johnson v. Huntington Beach U. High Sch. Dist.,* 68 Cal. App. 3d 1, 30-35, 107 Cal. Rptr. 43, 60-64 (Ct. of App. 1977) (McDaniel, J., dissenting); W. Overholt, *Religion in American Colleges and Universities* 11-12 (1970); Gallup, *Introduction to the 1979-80 Religion in America Index,* reprinted in 1 PRRC Emerging Trends, No. 6 (1979).

The Public University—Inculcation of Social Values

The college years can be a time of deep spiritual unrest and upheaval in which values are critically reexamined and life-determining commitments are made. *See* W. Overholt, *supra*, at 15-16; R. Taylor, *This Damned Campus* viii (1969); J. Hardon, *The Hungry Generation* 23 (1967). In institutions whose infrastructure is necessarily secularized, religion provides those spiritual and humane values which underlie truly liberal education. *See* H. Hintz, *Religion and Public Higher Education* 16-21 (1950); H. Allen, *Religion in the State University* 71, 79 (1950); C. Thwing, *Education and Religion* 104-15 (1929). By integrating the totality of knowledge in a way not done by other disciplines, and by providing a coherent and comprehensive system of values, religion aids the moral development of college youth. *See* H. Allen, *supra*, at iii; Muskie, *Religion, the University and the Future of American Society*, in *Students, Religion and the Contemporary University* xix (C. Mineman ed. 1970); E. Eddy, *The College Influence on Student Character* 120-21 (1959).

Public Universities—A Tradition of Religious Accommodation

Religion and religious activity have played a prominent role in the life of our public institutions of higher education for as long as they have existed in this country. Kauper, *Law and Public Opinion*, in *Religion and the State University* 76-79 (1958); C. Shedd, *The Church Follows Its Students* 6-12 (1938); W. Ambrose, *The Church in the University* 58 (1968). Many public universities have provided chaplains or religious coordinators on their staffs. G. Jones, *The Public University and Religious Practice* 53 (1973); Kauper, *supra*, at 78-79. Many also provide, or allow, religious centers or

other facilities on their campuses to accommodate the spiritual needs of their students, Olds, *Religious Centers,* in *Religion and the State University, supra,* at 226-47; Kauper, *supra,* at 79.

Clearly, history belies the proposition that the proper application of First Amendment principles requires exclusion of virtually all student worship and religious activity from the campus. Indeed, two of the foremost proponents of those principles, Thomas Jefferson and James Madison, fostered religious worship and spiritual development on the university campus. As members of the Board of Visitors of the University of Virginia, they expressly approved the adoption of regulations for the University of Virginia which included the following provisions:

> Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend *religious worship at the establishment of their respective sects,* in the morning, and in time to meet their school in the University at its stated hour.
>
> * * * *
>
> The upper circular room of the rotunda shall be reserved for a library.
>
> One of its longer elliptical rooms on its middle floor shall be used for annual examinations, for lectures to such schools as are too numerous for their ordinary school-room, *and for religious worship, under the regulations allowed to be prescribed by law.*

19 T. Jefferson, Writings 439, 449-50 (1903) (emphasis added). Further, in his letter dated November 2, 1822 to Dr. Thomas Cooper of Philadelphia, Jefferson stated:

> In our university you know there is no Professorship of Divinity. A handle has been made of this,

> to disseminate an idea that this is an institution, not merely of no religion, but against all religion. Occasion was taken at the last meeting of the Visitors, to bring forward an idea that might silence this calumny, which weighed on the minds of some honest friends to the institution. In our annal report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of *encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university,* so near as that their students may attend the lectures there, and have the free use of our library, *and every other accommodation we can give them;* preserving, however, their independence of us and of each other.

15 *id.* at 405 (emphasis added).

It is clear that the University's attempt to sever meaningful religious observance from the public university campus does violence to our academic traditions and the historical parameters of First Amendment principles. The depth of that violence is best perceived through a consideration of Article III of the Northwest Ordinance of 1787, which was reenacted by the same Congress that proposed the First Amendment. Article III provided, in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52.

"Benevolent Neutrality"—A Critical Principle For A Critical Phase

There are few places or circumstances that require benevolent neutrality more than a public university. The university is a community in itself and bears responsibility for all the needs of its students, most of whom have severed home ties at least temporarily. Strozier, *Analysis of the*

Student Community, in *Religion and the State University, supra,* at 195-213. They must be free to develop their social values according to religious and spiritual norms just as much as they are guided by other influences. As has already been demonstrated, this is demanded by the welfare of society in general and of students in particular.

The total exclusion of meaningful religious observance from the life of the university community would create an artificial environment out of keeping with the traditions and modes of the larger society. Spiritual and moral values would effectively be stamped as unimportant to life in our society. Such a policy fundamentally disregards Justice Goldberg's admonition in *School District of Abington Township v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg J., concurring): "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings."

"Benevolent Neutrality" Requires Affirmance

It is not the purpose of this *amicus* to elucidate or examine the applicable law. That will be done by the parties. However, it would conclude its presentation with the following remarks.

First, the issue here was also resolved by the Supreme Court of Delaware in *Keegan v. University of Delaware,* 349 A. 2d 14 (Del. Sup. Ct. 1975), *cert. den.,* 424 U.S. 934 (1976). In that case the university sought to enforce a regulation which prohibited students and priests from conducting religious worship services in the common room of the student dormitory on the basis of the Establishment Clause of the First Amendment. The court unanimously ruled that

the regulation imposed an excessive burden on the students' constitutional right to the free exercise of their religion.

Second, the petitioner urges that Missouri's constitution requires a different result because it evidences a compelling state interest in "separation" of such magnitude that it mandates the hostility to religion exhibited in this case. This *amicus* questions whether anything contained in the Missouri Constitution, or the decisions of the courts of that state, mandate such a result.[1] Nevertheless, even if the Missouri Constitution were properly so construed, such an expanded application of the so-called doctrine of "separation" would clearly offend the Free Exercise Clause of the First Amendment. No state interest of the dimensions and compelling character required to justify infringement on such a fundamental right has been articulated by petitioners. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 405 U.S. 205, 215 (1972).

The University's regulation conflicts directly with the moral and spiritual development of respondents and their fellow students, and is at variance with the history of higher public education in this country. The degree of separation of church and state espoused by petitioners goes far beyond what is necessary to advance the legitimate purposes served by separation, so far in fact that it impinges directly and palpably upon the free exercise rights of respondents and their coreligionists. For that reason, this *amicus* urges the Court to affirm the lower court decision invalidating the University's regulation.

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1. A Missouri statute from the late 19th century, Mo. Rev. Stat § 9763 (1899), authorized "the use of school houses for religious, literary or other public purposes . . . when such use shall be demanded by a majority of the voters of [school] districts voting at any annual or special meeting where such question was submitted." *State v. Kessler*, 136 Mo. App. 236, 117 S.W. 85 (Ct. App. 1909).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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